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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re the Marriage of JEFF and HOLLY KILBURN.	
JEFF KILBURN, Respondent, v. HOLLY KILBURN, Appellant.	F036944 (Super. Ct. No. 619102-7) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Fresno County. Dwayne Keyes, Judge.[‡]

Glen E. Gates for Appellant.

David J. St. Louis for Respondent.

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[*]Before Dibiaso, Acting P.J., Cornell, J. and Polley, J.[†]

[†]Judge of the Tuolumne Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

[‡]Retired judge of the Fresno Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Appellant Holly Kilburn (Holly) appeals from a judgment of dissolution of marriage which, inter alia, confirms to respondent Jeff Kilburn (Jeff) 100 percent of the shares of a certain corporation, holding that the community never acquired any interest therein. On appeal, Holly contends that the trial court (1) failed to apply the correct standard in determining whether the community acquired an interest in the shares of the corporation by reason of Jeff's efforts during marriage, and (2) that there is no substantial evidence to rebut the Family Code section 760 presumption that shares in the corporation purchased by Jeff during marriage were community property. We will affirm as to the first issue and reverse as to the second issue.

FACTS AND EXPERT TESTIMONY

Holly and Jeff were married on December 10, 1977. In March 1977, nine months before marriage, Jeff formed a partnership with James Tozzi (Tozzi) known as Royal Fruit & Vegetable Company. In September 1977, the business was incorporated and became Royal Fruit & Vegetable Company, Inc. (Royal). The corporation issued 60 shares of stock to Jeff and 40 shares of stock to Tozzi for a total of 100 shares outstanding.

In 1984, Jeff purchased Tozzi's 40 shares for the sum of $10. At the same time, Royal repaid loans by Tozzi to the corporation totaling $7,345.94.

Jeff has served as president and chairman of the board of directors of Royal and has managed the corporation during the entire length of the marriage.

At trial, Dillon Gnagy, a certified public accountant, testified in regard to his opinion of the value of Royal and as to his opinion that, pursuant to either *Van Camp v. Van Camp* (1921) 53 Cal.App. 27 or *Pereira v. Pereira* (1909) 156 Cal. 1, Royal is entirely the separate property of Jeff. He further testified that, in the event the court found that the 40 shares of stock acquired by Jeff from Tozzi in 1984 was community property, the value of the community property interest would be 40 percent of the total value of Royal.

Paul Quinn, another certified public accountant, also testified on the same subjects. In his opinion, the valuation of Jeff's separate property interest in the shares of Royal should be calculated under *Pereira v. Pereira, supra,* rather than *Van Camp*. In his

opinion, the community estate had an interest in the corporation whether or not the 40 shares purchased from Tozzi are community property.

DISCUSSION

1. Application of *Pereira* and *Van Camp* to Jeff's separate property interest in shares of Royal

Family Code section 770, subdivision (a) defines separate property of a married person to include "[a]ll property owned by the person before marriage" together with the rents, issues and profits of that property. Jeff owned 60 of the 100 shares in Royal before marriage. During marriage, he devoted his time, talent and labor to that business. Jeff's time, talent and labor were community property. (*In re Marriage of Dekker* (1993) 17 Cal.App.4th 842, 850.)

> "Appellate review of a trial court's finding that a particular item is separate or community property is limited to a determination of whether any substantial evidence supports the finding. [Citations.] … [¶] … [¶] We begin by noting that in California, property acquired prior to marriage is separate, while property acquired during the marriage is presumed community property. [Citations.] Income from separate property is separate, the intrinsic increase of separate property is separate, but the fruits of the community's expenditures of time, talent, and labor are community property. [Citations.] [¶] Indeed, the basic concept of community property is that marriage is a partnership where spouses devote their particular talents, energies, and resources to their common good. [Citation.] Acquisitions and gains which are directly or indirectly attributable to community expenditures of labor and resources are shared equally by the community. [Citation.] [¶] Where community efforts increase the value of a separate property business, it becomes necessary to quantify the contributions of the separate capital and community effort to the increase. [Citation.] It is well settled in California that income produced by an asset takes on the character of the asset from which it flows. Thus, rents, issues and profits are community property if derived from community assets, and separate property if derived from separate assets. [Citations.]" (*In re Marriage of Dekker*, *supra*, 17 Cal.App.4th at pp. 849, 850-851.)

The trial court, in its statement of decision, expressly based its conclusion that the community had not acquired any interest in Jeff's separate property shares of Royal by reason of Jeff's community property contribution of time, talent and labor on the testimony

of Mr. Gnagy and his calculations under *Pereira v. Pereira*, *supra*. There is substantial evidence to support the trial court's conclusion in the testimony of Mr. Gnagy.

> "'"A reviewing court must accept as true all evidence tending to establish the correctness of the findings of the trial judge. All conflicts in the evidence must be resolved in favor of the [prevailing party] and all legitimate and reasonable inferences must be indulged in to uphold the judgment."'" (*In re Marriage of Okum* (1987) 195 Cal.App.3d 176, 181-182.)

We conclude that the trial court did not abuse its discretion in applying *Pereira* or accepting Mr. Gnagy's conclusions in regard to Jeff's separate property shares of stock in Royal.

2. Application of Family Code section 760 to the 40 shares of stock in Royal purchased by Jeff from Tozzi

In 1984, when Jeff and Holly had been married over six years, Jeff, Royal, and Tozzi entered into an agreement whereby Tozzi would sell his 40 shares of stock in Royal to Jeff for $10, and Royal would pay back outstanding loans from Tozzi to Royal in the total amount of $7,345.94. The transaction was approved by Royal's board of directors on February 14, 1984, and reduced to writing in May 1984. The board of directors of Royal then consisted of Jeff, Holly, and Dana K. Venner, the corporate secretary. Jeff contends, and the trial court found, that this transfer of shares was a separate property transaction. We respectfully disagree.

The trial court based its decision on Royal's articles of incorporation, filed with the Secretary of State on September 30, 1977, the minutes of the meeting of Royal's board of directors on February 14, 1984, and the May 1984 agreement for sale and transfer of stock. None of these documents even remotely addresses or affects the community property or separate property characterization of the 40 shares of stock purchased by Jeff from Tozzi.

Article Five, subparagraph (b) of the articles of incorporation says:

> "Commencing one (1) year after the formation of this corporation, each shareholder of this corporation shall be entitled to purchase and/or subscribe for the number of any shares, option rights, or securities having conversion or option rights with respect to shares of this corporation which may be hereafter authorized and issued for money, which bears the same ratio to the

number of shares, option rights, or securities then proposed to be issued as the number of shares held by him shall bear to the number of shares subscribed or outstanding immediately prior to such additional issue."

This paragraph gives existing shareholders the right, in the event that the corporation issues additional stock or stock options, to buy that portion of the new shares or option rights which is proportionate to the shares held by the shareholder to the total number of outstanding shares in the corporation before the new issue. This prevents the shareholder's interest in the corporation from being diluted by the issuance of new shares or options to buy new shares by the corporation to other shareholders or to third parties without the shareholder first having the opportunity to buy sufficient shares or rights to purchase shares to maintain the shareholder's proportionate existing interest in the corporation.

Article Five, subparagraph (c) says:

"Before any valid sale or transfer of shares of this corporation may be made any registered holder proposing to make such transfer shall give notice in writing to the secretary of the corporation stating the number of shares proposed for transfer and the price and terms of the sale. Within ten (10) days after receipt of such notice the secretary shall mail a copy thereof to all registered holders of shares. Within fifteen (15) days from the date of mailing said notice, any shareholder who wishes to purchase the shares proposed for transfer shall notify the secretary in writing how many of said shares he wishes to purchase upon the price and terms of the offer. If elections to purchase exceed the number of shares for transfer, said shares shall be pro-rated among those electing to purchase according to their respective holdings of shares at the date of the mailing of said notices to shareholders. If those electing to purchase said shares do not elect to take up all of said shares at the price and terms of said notice, the excess thereof shall be divided pro rata among those electing to purchase upon the basis of their pro rata holdings of shares at the date of mailing of said notice to shareholders, or if all of said excess shares are not so taken up, such excess, as well as any other part of the shares proposed for transfer not taken up, may be sold by the shareholder proposing the transfer to such person or persons as he may wish, but shall not be sold upon lower price or better terms than those stated in the notice, and the secretary may require reasonable proof thereof before transfer of such shares. It is provided, however, that the terms of this paragraph shall not apply in the event that any of the shareholders shall choose to give, devise, bequeath or sell to any member of his family related either by blood or by marriage.

> "Any sale or transfer, or purported sale or transfer, of the shares of said corporation shall be null and void unless the terms, conditions and provisions of this Article Five are strictly observed the [*sic*] followed."

These paragraphs give existing shareholders a right of first refusal to purchase the shares of other shareholders before they are sold to third parties other than members of the selling shareholder's family. No part of Article Five has anything to do with whether shares held by any shareholder are separate property or community property. The acquisition of a community property interest by a spouse through operation of law is consistent with, not contrary to, this paragraph.

The minutes of the February 14, 1984, meeting of Royal's board of directors authorize the corporation to repay $7,345.94 to Tozzi and recite the corporation's agreement to Jeff's purchase of Tozzi's 40 shares. The minutes do not address the issue of whether or not Jeff would hold those shares as community property or separate property. Holly's agreement to the purchase in her role as a director of Royal cannot be construed as an agreement in her role as Jeff's spouse to transmute shares to separate property which would otherwise be community property, particularly in view of the fact that there is nothing in the record which even suggests that the subject was discussed at the meeting. The May 1984 agreement for sale and transfer of stock is likewise silent on the issue of whether the shares of Royal purchased by Jeff from Tozzi would be characterized as community property or separate property.

Family Code section 760 says: "Except as otherwise provided by statute, all property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in this state is community property." The 40 shares of Royal purchased from Tozzi by Jeff were purchased during marriage and are, therefore, community property. They were not acquired by gift, bequest, devise or descent, and they were not the rents, issues or profits of separate property. There is no evidence they were purchased with separate property funds. The fact that the price may have been low or that the corporation repaid money borrowed from Tozzi at the same time is not relevant to this inquiry. There is no evidence of any agreement by Jeff and Holly to transmute the shares

from community to separate property. We agree with Holly's contention that there is no evidence in the record which would support the trial court's finding that the 40 shares of stock are Jeff's separate property.

DISPOSITION

The judgment is reversed as to that portion which confirms the 100 shares of stock in Royal Fruit & Vegetable Company, Inc. to Jeff as his separate property, and the matter is remanded for reallocation of the community property in a manner consistent with this opinion. The judgment is affirmed in all other respects. Costs are awarded to Holly.